

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**RAY HALL DBA HALL  
LOGGING,**

**Respondent.**

**Docket No. FMCSA-2007-28571<sup>1</sup>  
(Eastern Service Center)**

**ORDER DENYING PETITION FOR RECONSIDERATION**

**1. Background**

On June 6, 2007, Ray Hall dba Hall Logging (Respondent) petitioned for reconsideration of a Notice of Default and Final Agency Order (NDFAO). Under 49 CFR 386.14(c), a respondent's failure to file a timely reply to a Notice of Claim (NOC) may result in the issuance of an NDFAO by the Field Administrator of the appropriate Service Center, which is apparently what happened in this case.<sup>2</sup> The NDFAO declares the respondent in default and advises that the NOC becomes the Final Agency Order on a date certain, with the civil penalty immediately due and payable on that date.

In the petition, Respondent's counsel, R. Brandon Johnson, asserted that Respondent brought the NOC to him in early May 2007, apparently believing that Mr. Johnson would represent him in this matter because Mr. Johnson was already

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<sup>1</sup> The prior case number is WV-2007-0018-US0076.

<sup>2</sup> The petition, filed by Respondent's counsel, did not enclose any supporting documents and failed to indicate when the NDFAO was issued, what violations were alleged in the NOC and the amount of the proposed civil penalty. It did assert that Respondent was served with the NOC on or about April 24, 2007.

representing Respondent in connection with a criminal matter. Mr. Johnson stated that he took no action in response to the NOC because it was beyond the scope of his employment agreement. He apparently did not communicate this fact to Respondent until June 4, 2007, when Respondent contacted him about it, presumably after receiving the NDFAO. Respondent requested that the NDFAO be vacated because the failure to reply to the NOC was due to an inadvertent mistake concerning the scope of Mr. Johnson's representation. The Eastern Service Center Field Administrator did not reply to the petition.

## ***2. Decision***

Respondent defaulted because he did not file a response within 30 days of service of the NOC, as required by 49 CFR 386.14. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief. Although it would have been helpful had the Field Administrator for the Eastern Service Center filled in some of the petition's informational blanks by filing a response to the petition, the fact remains that Respondent has the burden of demonstrating that the Final Agency Order should be vacated.

Respondent has failed to meet this burden. Although it does not expressly address the regulatory requirements, the petition essentially requests that the NDFAO be vacated because of excusable neglect. However, the NOC clearly articulates, in capital letters, that the failure to file a timely reply may result in issuance of an NDFAO within 30 days after service of the NOC. After receiving the NOC, Respondent's counsel should have

promptly advised Respondent that replying to the NOC was beyond the scope of his employment and alternative arrangements needed to be made. Conversely, Respondent had an obligation to read the NOC and ensure that a timely response was filed. The petition indicates that Respondent simply delivered the NOC to Mr. Johnson without discussing what information would be included in his reply. Had he done so, it would have become obvious to him that Mr. Johnson did not consider this matter within the scope of his employment. Consequently, the failure to timely file a reply to the NOC was caused by both the action and inaction of Respondent and his counsel. Therefore, the neglect was not excusable.<sup>3</sup> Moreover, because the petition is silent regarding what, if any, defenses Respondent may have to the allegations in the NOC, he has not demonstrated a meritorious defense.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing his Petition for Reconsideration shortly after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if he is unable to demonstrate a meritorious defense.<sup>4</sup>

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor

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<sup>3</sup> See *In the Matter of Wachstetter Farms, Incorporated*, Docket No. FMCSA-2008-0016, Order Denying Petition for Reconsideration (June 27, 2008), at 4.

<sup>4</sup> See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), at 5.

carrier or driver to participate in the proceedings when required to do so.<sup>5</sup> Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.<sup>6</sup>

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.<sup>7</sup>

*It Is So Ordered.*



Rose A. McMurray  
Assistant Administrator  
Federal Motor Carrier Safety Administration

4-23-09  
Date

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<sup>5</sup> *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, (May 25, 2001), at 3.

<sup>6</sup> *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration (March 15, 2002), at 3.

<sup>7</sup> Respondent should consult the NDFAO for payment instructions.

**CERTIFICATE OF SERVICE**

This is to certify that on this 24 day of APRIL, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

R. Brandon Johnson, Esq. Stroebel & Johnson, P.L.L.C. P.O. Box 1688 Lewisburg, WV 24901	One Copy U.S. Mail
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Anthony G. Lardieri, Esq. Trial Attorney Office of Chief Counsel (MC-CCE) Federal Motor Carrier Safety Administration 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061	One Copy U.S. Mail
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